Survey of Kansas Law: Real Property

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The last half-dozen years have brought relatively few important real property cases to the Kansas appellate courts. From the mid-1980s until the end of the decade, a diminishing number of interesting and groundbreaking cases were decided in the traditional areas of landlord-tenant, adverse possession, easements and covenants, and land transactions. More recently there has been an unusually high percentage of opinions dealing with public control of land use, including eminent domain, public regulation, and inverse condemnation decisions.

Most of the legislative actions in the first part of the period involved minor tinkering with existing statutory schemes. But in the last three years the legislature has enacted important new enabling acts for local regulation of land use and conservation easements, while continuing to update statutes involving more prosaic real estate transactions.

I. ADJUDICATION OF PRIVATE REAL PROPERTY ISSUES

As indicated above, there were only a handful of cases decided during the last few years that added important dimensions to traditional private property law. But important opinions were written, especially in the areas of landlord-tenant relations and private restrictions on property use.

A. Landlord-Tenant

The last survey of real property law to appear in these pages¹ noted that Kansas appellate courts had not yet reconciled traditional, common-law landlord immunity from tort in premises liability actions with the Kansas Residential Landlord Tenant Act (KRLTA),² which had seemed to undercut the legal and policy bases for that traditional immunity.³ Two years later the court of appeals at least began that reconciliation in its important Jackson v. Wood⁴ decision.

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3. See Davis, supra note 1, at 779-80.
In *Jackson*, the tenant’s social guest was killed when carbon monoxide gas leaked from a heater vent. The guest’s children brought a wrongful death action, alleging, *inter alia*, that the landlord was liable because he had breached his statutory duty under the KRLTA to “maintain in good and safe working order and condition all . . . heating . . . appliances . . . supplied . . . by such landlord.” The trial court granted summary judgment for the landlord on the traditional basis that plaintiff was a licensee who was owed only a slight duty of care.\(^5\)

The court of appeals reversed,\(^7\) but not on the obvious grounds that the landlord’s negligent breach of a statutory duty involving health and safety created a right of action for one within the scope of its protection. The court was bound by the Kansas Supreme Court’s decision in *Borders v. Roseberry*,\(^8\) a pre-KRLTA residential liability case that applied traditional common-law immunity and its exceptions.\(^9\) However, the court in *Jackson* found another rationale for holding the landlord legally responsible for the death. It reasoned that the health- and safety-related duties imposed by the KRLTA were automatically incorporated into all leases covered by its terms, and thus evidence of neglect like that in the case before if constituted proof of a breach of an implied promise to maintain and repair.\(^10\) Because breach of a promise to repair was one of a few exceptions to common-law landlord immunity, the court thus gave injured parties the statutory protections of the KRLTA while retaining the traditional law as set out in *Borders*.\(^11\)

The obvious importance of *Jackson* is that for the first time the Kansas courts recognized, however tortuously, that when the legislature adopted the KRLTA, which changed the rules regarding duties for repair and maintenance in most residential leases, it also changed the rules regarding accountability for damages and injuries resulting from failure to meet those duties. Yet by grounding its decision in contract law, the court may have raised as many issues as it answered.

The central question is the nature of the contractual duty the court imposed. “Fault” has no part in a breach of contract action. Yet it is not clear that the court intended to impose strict liability

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7. *Id.* at 484, 726 P.2d at 800.
11. *Id.* at 480-81, 726 P.2d at 798.
on residential landlords. If a careful inspection of the heater in *Jackson* would not have revealed the defect, would the landlord nevertheless have been responsible? A related issue is whether this contractual duty is dependent in any way on a commensurate duty of the tenant to notify the landlord of dangerous conditions. If the tenant in *Jackson* had smelled gas for several days and not notified the landlord, would the landlord's responsibility for the harm remain?\(^\text{12}\) Equally important are the damages the injured party can seek for this breach. Is a plaintiff limited to the usual contract damages, or can a plaintiff seek the "consequential" or "punitive" damages associated with tort law?

*Jackson* was an important decision, but its full impact will not be realized until these fundamental, accompanying questions are answered. Ideally, the answers will come from a new look by the Kansas Supreme Court at *Borders* and other cases ignoring the impact of the KRLTA on premises liability questions.

The other KRLTA decision during the survey period was less cosmic in importance, but provided a stern lesson for landlords faced with a tenants failure to pay rent. In *Davis v. Odell*,\(^\text{13}\) the landlords had received a default judgment for unpaid rent and had subsequently obtained a writ of restitution and execution. While the tenants were at work, the sheriff took possession of the premises and gave the personal property he found there to the landlords, who later disposed of it.

The Kansas Supreme Court affirmed a conversion judgment against the landlords.\(^\text{14}\) It held that Section 58-2567 of the KRLTA had abolished common-law distress except as it was statutorily retained in Section 58-2565.\(^\text{15}\) Finding that the latter section is only triggered by abandonment and acceptance of a surrender, the court held the confiscation unlawful.\(^\text{16}\)

*Davis* is important both because the court held the landlords to the requirements of the KRLTA in an area once covered by the common-law and because, unlike the court of appeals in *Jackson*, it imposed the duty directly on the landlord rather than tangentially reading the statutory duty into the contract. The difference, of course, was that, in *Davis*, failure to meet the statutory duty

\(^{12}\) The gas in *Jackson* was actually odorless carbon monoxide, but the question remains an important one.


\(^{14}\) *Id.* at 272, 729 P.2d at 1126.

\(^{15}\) *Id.* at 266, 729 P.2d at 1121-22.

\(^{16}\) *Id.* at 268, 270-71, 729 P.2d at 1123, 1125.
resulted in a tort claim based in fault that gave the plaintiffs the opportunity to seek consequential, and perhaps punitive, damages.

The final important landlord-tenant decision came more recently in the narrow but important area of farm tenancy terminations. The issue in *Mendenhall v. Roberts* was whether otherwise proper notice giving August 1 as a termination date for land prepared for a fall seeded grain crop was effective under the special statute governing such notices.

The statute requires a landlord to give a March 1 termination date for most farm leases. The statute then creates exceptions for land devoted to fall seeded grain crops. If such crops have been planted or the land has been prepared for planting them, the statute provides that the "notice shall be construed as fixing the termination [of the affected land] to take place on the day following the last day of harvesting such crop or crops, or August 1, whichever comes first."

The difficulty in *Mendenhall* was that the landlord actually gave August 1 as the termination date. Calling the case "the ultimate nightmare for those who draft statutes and those who must interpret them," the court of appeals ultimately decided that the notice was proper even though it did not meet the letter of the statute. The sensible decision indicated that while the notice was technically defective, the legislative intent of protecting the tenant's rights was adequately served by the August 1 date. Thus, the court decided, there was substantial compliance with the statutory mandate.

**B. Private Restrictions on Property Use**

None of the three appellate decisions concerning enforcement of private restrictions on private property were of the magnitude of the *Jackson* case in landlord-tenant law. Still, all three cases

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18. Id. at 37, 831 P.2d at 571.
20. Id. § 58-2506(b)-(d).
21. Id. § 58-2506(b). The statutory scheme of § 58-2506 is that subsection (a) gives the general rule; subsection (b) gives the exception for crops already planted; and subsection (c) gives the exception for prepared land. The last subsection was the one involved in the principal case, and had only been added in 1979 in response to the holding in *Grey v. Schmidt*, 224 Kan. 375, 581 P.2d 1180 (1978).
23. Id. at 43, 831 P.2d at 574-75.
24. Id., 831 P.2d at 575.
25. Id.
involved fundamental issues and served as important lessons for those exercising such private rights in Kansas.

The most eye-catching decision came from the Supreme Court in *Mid-America Pipeline Co. v. Wietharn.* The plaintiff pipeline company had purchased an easement from a previous owner of the fee simple to install underground, high pressure pipes. One clause in the properly recorded instrument prohibited the fee owner from constructing any improvements on the easement that would interfere with maintenance or use of the pipes. The defendant, a subsequent owner with both constructive and actual notice, had built three buildings over the pipeline. When the defendant began construction of a fourth building, the company lost patience and asked for both a prohibitory injunction against future building and a mandatory injunction requiring dismantling of those improvements already constructed.

The district court granted the prohibitory injunction, but held it did not have the authority to grant a mandatory injunction requiring removal of the existing buildings. The supreme court reversed, with four justices signing the majority opinion.

Taking the same hard line the court of appeals had taken in a similar case several years earlier, the high court held that both injunctions should issue. It opined that each construction constituted a continuing violation of the company's easement rights, and that those rights survived completion of each building. The court also rejected all of the fee owner's equitable defenses, noting his actual knowledge of the pipeline.

The three dissenting justices agreed that a violation had taken place, but disagreed that a mandatory injunction should automatically issue. Rather, they wrote, the trial court should determine the most economical way to remedy the problem, then require the defendant to pay the cost of that solution.

The second case, *Gauger v. State,* involved the creation of an easement or, more precisely, the ownership of the servient tenement

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27.  *Id.* at 239, 787 P.2d at 718.
28.  *Id.* at 251, 787 P.2d at 725.
31.  *See id.* at 250, 787 P.2d at 724.
32.  *Id.,* 787 P.2d at 724-25.
33.  *See id.* at 251-52, 787 P.2d at 725 (Six, J., dissenting).
34.  *Id.* at 251, 787 P.2d at 725 (Six, J., dissenting).
over which the easement ran. A 1903 deed granted a substantial part of a section "except that part thereof occupied as railroad right of way." The question at the root of the plaintiff's inverse condemnation action was whether that language kept fee title to the roadbed in the grantor, or merely recognized the existence of the easement while transferring the underlying servient tenement to the grantee.

The supreme court affirmed the district court's determination that the servient tenement was transferred with the remainder of the tract. The supreme court noted that there was a long history of such cases in the state, with considerable authority that any attempt to retain fee title to part of a transferred parcel must be very clearly stated. It also observed that the underlying policy reason for the rule was the undesirability of having a long fee strip carved through the middle of a tract owned by another. It also held that because the State was the grantee in the 1903 transfer, the plaintiff could not claim any rights through adverse possession.

The third case, and the only case of note regarding private covenants decided during the survey period, was the recent Linn Valley Lakes Property Owners Ass'n v. Brockway. In a common occurrence, the Property Owners Association (POA) sued the defendant member to enjoin violation of a covenant prohibiting signs on any lot, or on or inside any building in the development. The defendant responded with an assertion that any such order would violate his First Amendment right to free speech.

The problem for the defendant, of course, was to establish that the POA's act constituted the necessary "state action" to trigger Fourteenth and First Amendment protection. He attempted to fill the missing link with Shelley v. Kraemer, the United States Supreme Court case holding that court enforcement of a privately created covenant barring a sale of real property to an African-American was an enjoinable state action.

36. Id. at 87, 815 P.2d at 502.
37. Id. at 93, 815 P.2d at 506.
38. See id. at 90-92, 815 P.2d at 504-06; see also Roxana Petroleum Corp. v. Jarvis, 127 Kan. 365, 273 P. 661 (1929); Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208 (1905).
39. See Gauger, 249 Kan. at 91, 815 P.2d at 505 (citing Barker v. Lashbrook, 128 Kan. 595, 279 P. 12 (1929)).
40. Id. at 92, 815 P.2d at 506.
42. 334 U.S. 1 (1948).
43. 334 U.S. at 21-23; see Brockway, 250 Kan. at 172, 824 P.2d at 951.
The Kansas Supreme Court, like others elsewhere, rejected the analogy to Shelley and held that no state action was involved. The court noted that the restriction in question merely involved use, and therefore the defendant’s rationale “would effectively bar enforcement of virtually any restrictive covenant, including agreements as to architectural style, residence size, fencing, etc.” While the court’s reasoning was more conclusory than analytical, its result was in keeping with other decisions over the years strictly limiting the potentially breathtaking reach of Shelley.

C. Miscellaneous

The other interesting real property decisions from our appellate courts during the survey period fell in a variety of categories. None was earthshaking beyond its own litigants, but several decisions established or reinforced important doctrines of law.

The interesting question at the core of Miller v. Alexander was whether certain references in the public record were sufficient to put a subsequent purchaser on inquiry notice of a pending interest, thereby giving him the “notice” that prevented his invocation of the protection of the Kansas recording statute. In Miller, the owner of an option to purchase a five acre tract sought specific performance against a defendant who had previously deeded a seventy-five acre tract to the option holder’s predecessor-in-interest. Both the original warranty deed and the option had been recorded in the proper indexes, but both documents referenced the wrong section number. After the option holder purchased his interest, the defendant re-sold the five acres covered by the option to subsequent purchasers, the Barlows. The issue was whether the Barlows took subject to the option.

The court of appeals said that the Barlows did have notice of the previous grant, and thus specific performance should be granted. It determined that while the Barlows had no actual notice, they did have constructive notice because a reasonable search of the record would have brought forth the information.

The decision seems to put a considerable burden on subsequent purchasers and, for that reason, may appear unfair. But the court

44. See, e.g., Terre Du Lac Property Owners’ Ass’n v. Wideman, 655 S.W.2d 803 (Mo. Ct. App. 1988).
45. Brockway, 250 Kan. at 172, 824 P.2d at 951.
46. Id.
49. Miller, 13 Kan. App. 2d at 549, 775 P.2d at 203.
50. Id.
probably got the right result for the wrong reason—all relevant Kansas statutes deem a document properly recorded when it is given to the appropriate county official.\textsuperscript{51} This means the risk of improper recording by the official falls on subsequent purchasers rather than, as in some places, on the recorder himself.

An important mortgage redemption issue was settled in \textit{Federal Land Bank of Wichita v. Brown}.\textsuperscript{52} The Federal Land Bank (FLB) brought a foreclosure action. It intended to buy the foreclosed parcel at the sheriff’s sale, but failed to do so. The sale was confirmed over its objection, and shortly afterwards the original debtor assigned redemption rights to the buyer. Six months later FLB attempted to redeem, and the issue became whether FLB was a “creditor whose claim is . . . a lien prior to the expiration of the time allowed by law.”\textsuperscript{53}

The court said no.\textsuperscript{54} Admitting there was no relevant Kansas precedent, the court relied on the general rule that when a mortgagee forecloses, its lien merges into the decree and is extinguished.\textsuperscript{55} Thus, the foreclosing party could not be a creditor with a lien.\textsuperscript{56} The court acknowledged contrary holdings elsewhere, but distinguished them on the basis of differences in statutory language.\textsuperscript{57}

There were two adverse possession cases during the survey period. The more significant case, \textit{Barrett v. Ninnesch Bow Hunters Ass’n},\textsuperscript{58} concerned a successful assertion of title by the fee holder’s neighbor, who regularly used the property in question as a “get away,” maintaining a cabin, pole barn, and windmill for the statutory period.\textsuperscript{59} He also leased it to a neighbor for cattle grazing. Of the five statutory elements required for adverse possession, the only one the court had difficulty finding was “exclusivity.”\textsuperscript{60} The court found the element to be present, even though the fee owners used the property for “an occasional wiener roast and a picnic with the Campfire Girls.”\textsuperscript{61}

\textsuperscript{51} See \textsc{Kan. Stat. Ann.} \textsection 58-2222 (1983) ("from the time of filing the same with the register of deeds for record"); \textsc{Kan. Stat. Ann.} \textsection 58-2223 (1983) ("until the same shall be deposited with the register of deeds for record").
\textsuperscript{53} Id. at 304-05, 807 P.2d at 704 (citing \textsc{Kan. Stat. Ann.} \textsection 60-2414(b) (1983)).
\textsuperscript{54} Id. at 305, 807 P.2d at 705.
\textsuperscript{55} Id. at 305, 807 P.2d at 704.
\textsuperscript{56} Id. at 306, 807 P.2d at 705.
\textsuperscript{57} Id. at 305-06, 807 P.2d at 704-05.
\textsuperscript{59} Id., 806 P.2d at 490.
\textsuperscript{60} Id.
\textsuperscript{61} Id.
The opinion is in line with many others across the country holding that the possession necessary to establish adversity need not be constant, only commensurate with the use a normal owner would exercise. Here, the nature of the rural land in question made it appropriate for the claimant to establish adversity through something less than full-time use.

The second adverse possession case did not turn out as well for the claimant. In Miller v. St. Louis Southwest Railway Co., the claimant had purchased an interest in a tract of land subject to a railroad right-of-way. He had had full use of the tract for over the statutory period when he brought the quiet title action. The supreme court nevertheless found for the defendant because the possession had not been "hostile or adverse," deciding that the only hostile act occurred only five years earlier when claimant denied the railroad workers access to the tract.

The decision is sound, given previous Kansas decisions on the subject. The basic issue in these cases is whether use of railroad property by a servient tenement holder should be considered hostile or permissive in the face of knowing inactivity by the railroad. The court could decide either way fairly easily, but its traditional view, as expressed in Miller, seems sound—the railroad fundamentally owns an easement, and, traditionally, use of a non-exclusive easement by the servient owner is within his rights so long as it does not interfere with the holder's primary rights. Thus, because the fee owner had the right to use the property, that use could not be adverse.

II. ADJUDICATION OF PUBLIC REGULATION OF PRIVATE PROPERTY

While adjudication of purely private property issues lagged during the survey period, those involving public regulation and interference with private rights surged. Relatively, there were still more pure private property cases, but in a sure sign of the times, the percentage of real property cases concerning public regulation increased over any other similar period.

There were two pure kinds of public control cases and one hybrid. The first identifiable type concerned the power of eminent

64. Id. at 201, 718 P.2d at 612.
65. Id.
66. The court particularly relied on Harvey v. Railroad Co., 111 Kan. 371, 207 P. 761 (1922), a case in which even more intense use by the claimant was held not adverse.
67. See Miller, 239 Kan. at 200-01, 718 P.2d at 612.
domain, as exercised by either a governmental or quasi-governmental body to which the power has been legislatively transferred. The second type involved general regulation of the use of property through zoning or a closely related power. The hybrid involved cases purportedly concerning mere regulation that the landowner claimed crossed a magic constitutional line of intrusion to become "inverse" takings.

A. Eminent Domain

There are but two limitations on the power of the state or its designates to "take" private property—the taking must be for a "public use" and the interest holder must be given "just compensation." The "public use" limitation is seldom questioned, so just about every eminent domain cases is about money; that is, did the property owner receive, or have proper opportunity to receive, "just compensation?" This period's noteworthy eminent domain cases were no exception.

The first was Ryan v. Kansas Power & Light Co., a garden-variety case of valuation that involved an interesting issue. The claimants sought to introduce evidence that KPL's lines would decrease future property values more than expected because of the new "fear" about "the effect of the transmission line . . . outside the area of the easement on plants, animals, and humans." The trial judge not only allowed such testimony, but allowed it by non-expert witnesses as well as experts. KPL appealed the eventual awards.

The supreme court upheld the trial court's decision. In doing so it relied heavily on the court of appeals opinion in Wilsey v. Kansas City Power & Light Co. In Wilsey, the court identified three generally recognized approaches to the admissibility of "fear" testimony: (1) the "majority" rule that such evidence is too conjectural and must be excluded; (2) the "intermediate" rule that such evidence is admissible only if "reasonable"; and (3) the "minority" rule that such evidence is admissible as long as the

68. U.S. Const. amend. V.
69. This is primarily because courts give legislatures a vast range of discretion to determine what is a "public use." See Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984).
71. Id. at 4, 815 P.2d at 532.
72. Id. at 5, 815 P.2d at 532.
73. Id. at 10, 815 P.2d at 535.
fear testified to is not just the personal fear of the witness. The supreme court then concluded that Willsey had correctly applied the minority rule, stating: "Thus a landowner or any other non-expert witness can qualify as a witness to testify concerning fear in the marketplace if he or she establishes through foundation that members of the public have conveyed such information to the landowner or other non-expert witness."  

The decision seems entirely sensible, regardless of its adverse effect on awards against power companies. Of the three possible positions the court identified, one—the "intermediate" rule—seems particularly odd. If a fear is driving down the value of land taken by condemnation, of what relevance is the reasonableness of that fear? Is the effect any different on the claimants? If the power company can obtain testimony that the fear will dissipate in the future, that too should be relevant. But sound testimony of market effect should not be excluded because a judge believes it "unreasonable."  

As between the "majority" rule of excluding such evidence entirely or the "minority" rule of admitting it under the controlled conditions set out in Ryan, the latter seems the much better choice. It is inarguable that the enormous amount of publicity about the effects of high voltage transmission lines has permeated the marketplace for property near such lines. Such information, rational or not, does and will affect fair market value. It is neither just nor sensible for a landowner to go uncompensated for all losses simply because an appellate court believes evidence of market effect is too "speculative." The lawyers, trial judge, and jurors are in a much better position to sort out that issue.  

The survey period's other evidentiary question relating to valuation was far more mundane. The issue in Board of County Commissioners of Sedgwick County v. Kiser Living Trust was whether the trial court had properly excluded the county's expert testimony regarding the highest and best use of the property in question. The trial court's ruling was based on its prior exclusion of comparable sales evidence.  

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75. See id. at 604-13, 631 P.2d 273-79.  
76. Ryan, 249 Kan. at 7, 631 P.2d at 280. Ryan was followed the same year by the supreme court's decision in Van Horn v. City of Kansas City, 249 Kan. 404, 819 P.2d 624 (1991), where the issue was whether the claimant could introduce evidence of the likely future effect on market value of expanding a street to four lanes. The court again agreed that such evidence was admissible. Van Horn, 249 Kan. at 408-09, 819 P.2d at 628-29.  
78. Id. at 93, 825 P.2d at 138.
The supreme court reversed the exclusion.\textsuperscript{79} It noted that one factor required by statute to be taken into account in eminent domain or inverse condemnation actions is "'[t]he most advantageous use to which the property is reasonably adaptable.'"\textsuperscript{80} Beginning with that premise, it reasoned, the trier of fact should consider evidence from both parties on the issue of highest and best use, and any exclusion of comparable sales data should not alter that basic premise.\textsuperscript{81}

\textbf{B. Zoning and Related Regulation}

There were five land regulation opinions of note during the survey period. Unlike the years covered by the most recent survey, the emphasis of these was not on the \textit{Golden} decision regarding the nature and application of zoning ordinances.\textsuperscript{82}

One relatively minor decision did offer further refinement of the boilload of issues launched by \textit{Golden}. In \textit{Davis v. City of Leavenworth},\textsuperscript{83} the supreme court held that the \textit{Golden} factors—items that should be considered when determining the reasonableness of an ordinance as applied to a particular tract—could be found in the normal ebb and flow of a city government's debate.\textsuperscript{84} Specifically, the court found that the factors were accounted for in the zoning decision in question because "'[t]he minutes and transcripts . . . reflect a lively and thoughtful discussion with input by individual commissioners, the developer, surrounding property owners, the public (pro and con), and the planning staff.'"\textsuperscript{85} The court also took the opportunity to correct a previous syllabus indicating that a trial court must remand a zoning controversy if it finds the municipal government's record inadequate.\textsuperscript{86}

The second pure zoning issue decided was whether the state needed to obtain a special use permit to build a prison facility in a county requiring such permits for private contractors. In \textit{Hermann v. Board of County Commissioners of Butler County},\textsuperscript{87} the supreme court said no, holding that local regulations applied only

\begin{itemize}
\item \textsuperscript{79} \textit{Id.} at 98, 825 P.2d at 141.
\item \textsuperscript{80} \textit{Id.} (citing \textit{Kan. Stat. Ann. § 26-513(d)} (1986)).
\item \textsuperscript{81} \textit{Id.}
\item \textsuperscript{82} The most recent Survey devoted considerable space to the Kansas Supreme Court's decision in \textit{Golden v. City of Overland Park}, 224 Kan. 591, 584 P.2d 130 (1978), as well as subsequent interpretations of that opinion. See \textit{Davis}, \textit{supra} note 1, at 774-778.
\item \textsuperscript{83} 247 Kan. 486, 802 P.2d 494 (1990).
\item \textsuperscript{84} See \textit{id.} at 494-96, 802 P.2d at 500-01.
\item \textsuperscript{85} \textit{Id.} at 496, 802 P.2d at 500-01.
\item \textsuperscript{86} \textit{Id.} at 496-97, 802 P.2d at 501.
\item \textsuperscript{87} 246 Kan. 152, 785 P.2d 1003 (1990).
\end{itemize}
if the state is unable to demonstrate a compelling interest in constructing the improvement in question. 88 The court also employed its previously adopted five-point test of when state improvements were subject to local land use controls. 89

The third regulation issue concerned the authority to grant variances from underlying zoning ordinances. In City of Merriam v. Board of Zoning Appeals, 90 the city itself challenged a variance granted by its own Board of Zoning Appeals (BZA) for a 990-foot tower in a zone with a 75-foot height limit. In response, the BZA and the developer challenged the underlying premise of the action. The basis of their argument was that the rigid requirements of Section 12-715 of the Kansas Statutes Annotated, which the city claimed had not been met, applied only to "use" variances, not to those aimed merely at bulk or height control.

The supreme court rejected the argument and held that the variance was unlawfully issued. The court found that the relevant section of the enabling act specifically prohibited use variances altogether, and thus the listed criteria had to apply to bulk and height variances. 91 It then went on to agree with the trial court that those statutory standards had not been met. 92

The final zoning-like question concerned what remedy a court could order if a landowner proved that a municipality's refusal to rezone violated the basic reasonableness standard all such ordinances must meet. 93 In Jack v. City of Olathe, 94 the landowner sued for a mandatory injunction and damages after the city denied his application for upzoning from single to multiple family residential use.

The trial court found the city's refusal unreasonable and, in an interesting move in its own right, ordered the local governing body to adopt the requested amendment. 95 It then denied all damages. 96

88. Id. at 158-59, 785 P.2d at 1008-09.
89. Id. at 157-58, 785 P.2d at 1007. The test was announced in Brown v. Kansas Forestry, Fish and Game Comm'n, 2 Kan. App. 2d 102, 576 P.2d 230 (1978).
91. Id. at 535-38, 748 P.2d at 886-88.
92. Id. at 536-43, 748 P.2d at 887-91.
93. KAN. STAT. ANN. § 12-712 was the appropriate enabling statute at the time. It read: "Any ordinance or regulation provided for or authorized by the act shall be reasonable. . .." It was repealed in 1991 and replaced by KAN. STAT. ANN. § 12-760(a), which retained the same standard.
95. Id. at 459, 781 P.2d at 1070. For a thoughtful analysis of the options available to the judiciary when an ordinance is found unreasonable, see Schwartz v. City of Flint, 395 N.W.2d 678 (Mich. 1986).
The supreme court affirmed the latter decision, holding that a finding of unreasonableness did not authorize a damage award.\textsuperscript{97} The damages decision in \textit{Jack} is in line with a century of holdings that an \textit{ultra vires} act by a governmental body is not a basis for an individual damage award. That long line of decisions was put in some question the year before \textit{Jack}, however, by the United States Supreme Court's holdings in \textit{First English Evangelical Lutheran Church v. County of Los Angeles}\textsuperscript{98} and \textit{Nollan v. California Coastal Commission}.\textsuperscript{99} \textit{First English} held that at least temporary damages must be paid for all regulatory takings,\textsuperscript{100} and \textit{Nollan} can be read as holding that regulating without a substantial relationship to a legitimate public goal amounts to a taking.\textsuperscript{101} As the latter reading would arguably cover the "reasonableness" standard of the Kansas statutes, there is some basis for maintaining \textit{Jack} was\textsuperscript{102} wrongly decided. Yet, there is no case that definitively equates "reasonableness" with the \textit{Nollan} language, and until one comes along there are good reasons to believe \textit{Jack} was decided correctly.\textsuperscript{102}

The final pure regulation case, \textit{Allen Realty v. City of Lawrence},\textsuperscript{103} involved historic preservation. The owner in question had fee title to a nineteenth-century stone church that had been abandoned for safety reasons. When the owner sought a demolition permit, the proximity of the church to the Douglas County courthouse—a building listed on the National Registry of Historic Places—triggered historic preservation legal machinery that culminated in a recommendation by the State Historic Preservation Office (SHPO) that forced the city to deny the permit unless there was "no feasible and prudent alternative."\textsuperscript{104} The court of appeals affirmed the dismissal of the owner's action against SHPO, fundamentally because its recommendation was not arbitrary or capricious.\textsuperscript{105} If it did, however, reverse a summary judgment for the

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\textsuperscript{97} Id. at 467, 781 P.2d at 1075.
\textsuperscript{98} 482 U.S. 304 (1987).
\textsuperscript{100} \textit{First English}, 482 U.S. at 317-22.
\textsuperscript{101} See \textit{Nollan}, 483 U.S. at 834-37, 841-42.
\textsuperscript{102} For a critical analysis of the problems \textit{Nollan} creates when mixed with \textit{First English}, see Michael J. Davis & Robert L. Glicksman, \textit{To the Promised Land: A Century of Wandering and a Final Homeland for the Due Process and Taking Clauses}, 68 \textit{Ok. L. Rev.} 393, 439-446 (1990).
\textsuperscript{104} Id. at 362-63, 790 P.2d at 950.
\textsuperscript{105} Id. at 369-71, 790 P.2d at 954-55.
\end{footnotesize}
city, stating that, while it was proper for the owner to carry the burden to prove there was "no feasible alternative," the district court improperly expected the owner to dispel all suggested alternatives gleaned from governing body members and the public at large.

C. Regulatory Takings

The final area in which the appellate courts had significant activity was a hybrid of the first two areas and concerned so-called "regulatory takings." During the first 150 years of American jurisprudence there was no such thing as a regulatory taking, but after Justice Holmes's opinion in the headwater case Pennsylvania Coal Co. v. Mahon, courts came to hold that regulation in and of itself could "take" property in the constitutional sense if it restricted use too greatly.

Two Kansas cases during the survey period looked at when a regulation can become a taking in the context of denied access, and a third case analyzed what statute of limitations should apply to an inverse condemnation action alleging a regulatory taking. This last case was probably the most important of all property cases decided by Kansas appellate courts during the period in question, and seems likely to achieve national prominence as a model of a good analytical approach to the issue.

Both cases in which a regulatory taking was alleged involved loss of access to the claimant’s property because of road improvements. In the first, Hudson v. City of Shawnee, the city permanently closed one of two access points to the claimant’s service station as part of a street-widening project. The supreme court rejected claimant’s argument that the removal of access constituted a regulatory taking, noting that as long as one access point remained, the action was merely a health and safety regulation falling well within the municipality’s police power.

The second case was decided similarly. In Hales v. City of Kansas City, the claimant alleged that his compensation for a physical taking of part of his property undervalued his loss because it failed to include an award for diminution in value caused by

106. Id. at 371, 790 P.2d at 955.
107. Id. at 372-74, 790 P.2d at 956-57.
108. 260 U.S. 393 (1922).
110. Id. at 227-29, 777 P.2d at 806-07.
loss of access arising from installation of a median strip. This time the supreme court acknowledged that it had conflicting precedents on loss-of-access cases, but relied on Hudson to hold that local governments have considerable authority under the police power to reduce, though not eliminate, access to private property from public roads.

If there was a jewel carved in property law during the period, it was by the supreme court in its unanimous decision, Hijji v. City of Garnett. The issue before the court, which came to it by certification from the United States District Court of Kansas, was which statute of limitations should be applied to regulatory taking claims.

There is no federal statute governing inverse condemnation claims arising under the Fifth and Fourteenth Amendments. To fill the void, federal courts have generally, but not exclusively, "borrowed" an appropriate state statute. This process has evoked a variety of answers but few penetrating analyses. Indeed, the state of the law was very uncertain when the District Court certified its issue.

The law probably remains uncertain, but through no fault of the Kansas Supreme Court, which gave a detailed review of all arguably applicable statutes before picking a highly logical choice as its answer. The court first rejected the implied contract statute that had been suggested by the federal court in its inquiry, even while acknowledging that its own precedents had often referred to inverse condemnation as "akin to an action on implied contract."

The main point, the court noted, was to recognize that "the basic right to recover compensation . . . is a constitutional one." After determining that some statute should apply, the court then analyzed three more candidates before finally selecting Section 60-507, a statute giving claimants fifteen years to file such claims.

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112. See supra notes 109-10 and accompanying text.
115. Id. at 2, 804 P.2d at 951.
116. Besides Hijji, the best examination was offered in Azul Pacifico, Inc. v. City of Los Angeles, 948 F.2d 575 (9th Cir. 1991).
118. Id. at 12, 804 P.2d at 957.
119. Id. at 13, 804 P.2d at 958.
120. KAN. STAT. ANN. § 60-507 (1983). This section provides that "no action shall be maintained for the recovery of real property or for the determination of any adverse claim or interest therein . . . after fifteen (15) years from the time the cause of action accrued."
Id.
121. Hijji, 248 Kan. at 13, 804 P.2d at 958.
The decision in *Hiji* will almost certainly become a leading case in deciding the vexatious issue of statutes of limitations for regulatory taking claims. It stands as a fine piece of legal analysis and a fitting ending for a review of this kind.

III. LEGISLATIVE ACTIONS REGARDING REAL PROPERTY

All principal legislative changes in real estate law came in the final three years of the survey period, 1990-1992. While the most important change was the enactment of a new enabling act for zoning and other local regulation, noteworthy amendments or additions were passed in several other areas as well.

A. 1990 Legislation

Two key measures passed in 1990. The first provided a certification mechanism for real estate appraisers,\(^ {122} \) and the second added protections for homeowners facing foreclosure proceedings.\(^ {123} \)

The legislation requiring real estate appraiser certification was an outgrowth of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA),\(^ {124} \) the federal government’s chief regulatory response to the crisis in the “thrift” industry. The key provision of the legislation prohibited anyone but a certified appraiser from engaging in real estate appraisal or related activities whenever FIRREA or local law required a certified appraisal.\(^ {125} \) The legislation also provided for the appointment of a real estate appraisal board\(^ {126} \) and granted it authority to establish certification standards, testing procedures, and continuing education obligations.\(^ {127} \)

The legislation established two classes of certified appraisers: (1) “residential” appraisers, who could appraise small commercial, one to four unit residential, and agricultural property; and (2)


"general" appraisers, who could appraise anything. Final provisions of particular significance prohibited certification of anything but individuals, and established twelve bases for revocation or suspension of certification.

The second piece of 1990 legislation attempted to prevent unscrupulous buyers from preying on homeowners facing foreclosure. Apparently, it had become common for certain rapacious creditors and third parties to approach financially troubled owners, offering to buy them out for a very low price and never informing them of redemption and other rights. Section 1 of the new law makes its subsequent provisions applicable whenever a homeowner, whose residence is the object of foreclosure proceedings, sells any rights in the property that result in anyone other than the owner, a family member, or the buyer residing there after the transfer. Other key provisions give owners five business days to rescind any transfer while forbidding alienation of that right, and required an extensive disclosure statement that buyers must present and owners must both read and sign before the sales transaction can be valid.

B. 1991 Legislation

The following year two more pieces of legislation affecting real estate passed, including the centerpiece of the entire survey period, a new enabling action for local regulation of land use and development.


For decades, planning, zoning, and subdivision regulation in Kansas had been governed by separate statutes for municipalities, counties, and even townships. All were loosely based on the Standard State Zoning Enabling Act and the Standard City Planning Enabling Act, and had been fundamentally unchanged since zoning began in the 1920s. The first accomplishment of the 1991 legislation was to bring all authority under a common enabling act. Then, while leaving the traditional methods and institutions of zoning intact, the legislation clarified and considerably expanded local prerogatives to regulate.

There are several areas critical to planning and zoning changed or created in the new statute. A principal goal of the drafters was to make it clear that local governments have the authority to enact types of ordinances about which there had been uncertainty in the past. This was accomplished in two ways. First, the statute began with a statement that it was not intended to "prevent the enactment or enforcement of additional laws and regulations on the same subject which are not in conflict with [its] provisions." It then explicitly authorized municipalities and counties to adopt certain regulations that had not been specifically authorized before, including regulations to permit transferrable development rights, to engage in historic preservation, to control aesthetics, to require special use permits, and to establish overlay zones. The same section gives blanket authority to local governments to enact planned unit development ordinances, thereby accomplishing in one clause that which previously had required nine sections of the Kansas Statutes Annotated.

A second subset of provisions deals with comprehensive planning. Comprehensive planning remains optional under the new

140. Standard City Planning Enabling Act (U.S. Dep't of Commerce 1928).
144. Id.
law, but notice provisions have been broadened,\textsuperscript{146} final approval authority has been moved from the planning commission to the local governing body,\textsuperscript{147} and the mandatory annual review of the plan has been rendered more comprehensive in nature.\textsuperscript{148}

Two specific provisions also effect changes. The manufactured homes lobby scored a major victory: The new law prohibits governments from banning such housing from the zoning jurisdiction, or even from excluding it from single-family residential areas if the exclusion is based solely on the grounds that the homes are manufactured.\textsuperscript{149} The other provision codifies a significant change in the law regarding when development rights vest. The new section requires "recording of a plat" to vest rights in single-family residential developments,\textsuperscript{150} but states that other rights only vest "upon the issuance of all permits required for such use . . . and construction has begun and substantial amounts of work have been completed under a validly issued permit."\textsuperscript{151}

All in all, the new enabling statute is as important for what it did not change as for what it did. Planning, zoning, and subdivision regulations remain essentially as they were before the change, and the planning commission-local governing body-board of zoning appeals structure is unaltered. If one looks ahead, perhaps the most significant changes are those concerning the comprehensive plan. By requiring local governing body approval of both the original plan and any amendments, the new statutes tie the elected representatives of the community much more directly to the planning process and product. It seems almost inevitable that this new relationship will bring a higher degree of attention to the plan in zoning and related decisions. No doubt the plan will retain its historic position as a guide, but it seems likely that the guide will be more frequently and carefully consulted than in the past.

The other piece of legislation passed in 1991 was far less sweeping, yet important in its own right. The dicey issue of creditor

\textsuperscript{147} \textit{Id.} § 12-747(b).
\textsuperscript{148} \textit{Id.} § f2-747(d).
\textsuperscript{151} \textit{Id.} § 12-764(b).
priorities to rent assignments has been resolved in a single section. There are two key provisions: (1) subsection (b) validates the concept of rent assignments and provides that such assignments create valid and enforceable liens from the time of filing the security instrument; and (2) subsection (d) makes clear that any tenant who, upon notice from the lender, makes payments under the assignment must be credited as if the payments had been made to the lessor-borrower.

C. 1992 Legislation

The final piece of significant legislation passed by the 1992 legislature brought the Kansas enabling statute for conservation easements more in line with the Uniform Conservation Easement Act (Uniform Act). A conservation easement is a grant of all development rights on a particular tract to a government, or a preservation or environmental group, the purpose of which is to preserve the property in its natural state. Special enabling legislation is necessary for such a grant only because its nature runs afoot of two atavistic common-law doctrines that make judicial enforcement problematic. Kansas first passed a statute enabling conservation easements in 1987. The 1992 legislation was intended to bring the law more in line with the Uniform Act. The 1992 changes brought several important alterations to the statute. First, it expanded the number of purposes for which conservation easements can be granted, adding a number of environmentally based goals to the previously limited set. Second, it expanded the list of possible recipients of conservation easements to include environmental groups as well as governments. Finally,

154. Id. § 58-2343(d) (Supp. 1992).
156. The first problem with conservation easements under the common law is their negative nature—British law limited negative easements to those for (1) light and air, (2) support, and (3) flowing water in an artificial stream. Jesse Dukeminier & James E. Krier, Property 872 (2d ed. 1988). The second is the prohibition in many jurisdictions against enforcing easements when the benefit is held "in gross"; that is, when no particular piece of land is being benefitted. See, e.g., Caullett v. Stanley Stilwell & Sons, Inc., 170 A.2d 52 (N.J. Super. Ct. App. Div. 1961).
159. Id. § 58-3810(b)(2).
it provided that "unless the instrument creating it otherwise pro-
vides," an easement authorized by the law "shall be limited in
duration to the lifetime of the grantor and may be revoked at the
grantor's request."\footnote{160}

The first two changes track with the Uniform Act, and are
totally salutary. The final change is, however, troubled. Since
1973, conservation easements have been deductible charitable con-
tributions as long as they are perpetual and meet certain other
standards.\footnote{161} Now, under the Kansas statute, an unwaried grantor
may be deprived of that deductibility because the law renders the
easement for his lifetime only. Grantors with good counsel will
easily circumvent the problem in the instrument. Those without
such counsel may not. All in all, it hardly seems a wise change
from the Uniform Act.

IV. CONCLUSION

It was not a period of sea changes in Kansas property law. But
as everyone who remembers Property I knows, sea changes are
rare in this area of the law. Yet the increased percentage of cases
involving public regulation of land use, coupled with the important
statutory changes in the same field, probably tell an important,
albeit impressionistic, story about the state of the law of real
property. By now, codification, forms, and better educational
opportunities both in and after law school have rendered the daily
grist of land transaction work almost mechanical. Rare is the
practitioner who cannot complete a fundamental transaction with
at least the amount of precision and professionalism needed to
keep the matter out of the appellate courts. On the other hand,
the newer areas of real property law, particularly those involving
public regulation, have not reached the same state of harmony.
Here, more often, is \textit{terra incognita} for lawyers, judges, and
legislators. We should not be surprised, then, that from those
sources come the greater need for judicial and legislative attention.

\footnote{160. \textit{Id.} § 58-3811(d).}
\footnote{161. See I.R.C. § 170(h) (1988); 1976-2 C.B. 53.}